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No. 97-____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GARY ELDON ALVORD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

Wm. J. Sheppard, Esquire
COUNSEL OF RECORD
D. Gray Thomas, Esquire
Elizabeth L. White, Esquire
Sheppard and White, P.A.
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661
COUNSEL FOR PETITIONER

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(Capital Case)

QUESTIONS PRESENTED FOR REVIEW

The questions presented by this petition are:

1. Can acknowledged Hitchcock error ever be deemed harmless in the absence of a state court evidentiary hearing where such error involves significant non-record mitigating facts never considered by a sentencing court?

2. Is the decision of the Florida Supreme Court below unconstitutionally arbitrary in failing to order an evidentiary hearing to consider proffered non-record mitigating evidence presented by petitioner after having granted such relief to similarly situated collateral review petitioners?

3. Is a harmless error analysis applicable where an acknowledged Hitchcock error and the existence of additional non-record mitigating facts is compounded by the sentencing court and jury having considered aggravating circumstances under constitutionally invalid instructions?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Gary Eldon Alvord, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Florida entered in this case on April 10, 1997.

OPINIONS BELOW

The opinion of the Supreme Court of Florida, 1 App. 1a-18a, is published at 694 So.2d 704. The orders below in this proceeding of the Circuit Court, Thirteenth Judicial Circuit, Hillsborough County, Florida, are unpublished and appear at 2 App. 415a-418a and 2 App. 453a-455a to this Petition. The trial judge's Findings of Fact in Support of the Death Penalty, 2 App. 456a-462a, are unpublished. Additional opinions and orders entered in prior proceedings in this case are reported at Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976); Alvord v. State, 396 So.2d 184 (Fla. 1981); Alvord v. Wainwright, 564 F.Supp. 459 (M.D. Fla. 1983); Alvord v. Wainwright, 725 F.2d 1282 (11th Cir.), cert. denied, 469 U.S. 956 (1984); Alvord v. State, 459 So.2d 316 (Fla. 1984); and Alvord v. Dugger, 541 So.2d 598 (Fla. 1989), cert. denied, 494 U.S. 1090 (1990), and appear at 1 App. 19a-230a and 2 App. 231a-345a to this Petition.

JURISDICTION

The order sought to be reviewed was entered on April 10, 1997. The Supreme Court of Florida denied petitioner's timely motion for rehearing on May 28, 1997,

2 App. 366a, and issued its mandate on June 27, 1997, 2 App. 367a. This petition is a corrected petition filed timely under Rule 14.5 following return of a previous submission on December 8, 1997. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case requires interpretation and application of the Eighth and Fourteenth Amendments to the United States Constitution. The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. The Federal Questions Raised Below.

The federal questions sought to be reviewed in this petition challenging a death sentence involve undisputed

error under Hitchcock v. Dugger, 481 U.S. 393 (1987). The particular Hitchcock error at issue relates to evidence not presented at trial because state law precluded consideration of non-statutory mitigating circumstances. Petitioner's non-record mitigating evidence was proffered in the post-conviction proceedings below, but petitioner was denied an evidentiary hearing to fully present such evidence.

The issue of non-record Hitchcock error was raised in the court of first instance by way of petitioner's Second Motion for Post-Conviction Relief pursuant to Fla.R.Crim.P. 3.850, filed on June 30, 1989, and his amendment thereto. See, 2 App. 368a-391a, 392a-414a, and 419a-452a. On November 1, 1992, the court granted an evidentiary hearing, 2 App. 415a-418a, but on September 28, 1995, subsequently denied post-conviction relief without any evidentiary hearing. 2 App. 453a-455a. The petitioner timely appealed to the Supreme Court of Florida, which also denied relief. 1 App. 1a-18a; Alvord v. State, 694 So.2d 704 (Fla. 1997). This timely petition for writ of certiorari follows.

B. The Facts Material to the Questions Presented.

The petitioner was convicted by a jury of three counts of first degree murder on April 4, 1974. Following a further proceeding that night, the advisory jury recommended imposition of the sentence of death as to each of the three counts of conviction. On April 9, 1974, the trial court imposed the sentence of death.

At the time of petitioner's trial, the trial court's and the advisory jury's consideration of evidence mitigating against the death penalty was restricted by Florida law in capital sentencing proceedings to only those mitigating circumstances enumerated by state statute. See generally, Hitchcock v. Dugger, 481 U.S. 393, 395-99 & n.3 (1987); State v. Dixon, 283 So.2d 1, 9-10 (Fla. 1973) (if aggravating circumstance is found, death is presumed sentence unless "overridden by one or more of the mitigating circumstances provided in Fla. Stat. §921.141(7), F.S.A. [(1973)]."); Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) ("Evidence concerning other matters [than those itemized in the statute] have [sic] no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal."). Even in petitioner's

direct appeal, the court below noted that 1974 capital sentencing hearings in Florida were "geared to consider any facts or opinions which may be relevant in determining the statutory mitigating and aggravating circumstances." Alvord v. State, 322 So.2d 533, 539 (Fla. 1975) (emphasis added); 1 App. 37a. At petitioner's trial, the court instructed the jury that "[T]he mitigating circumstances which you may consider if established by the evidence are these...." [Tr. 992 (emphasis added)]. The trial court then instructed the jury solely as to the mitigating circumstances enumerated in §921.141, Fla. Stat. (1973). [Tr. 992-93].

The prosecutor argued that the jurors had promised to "follow the law that the Legislature has set out and the court will read to you and instruct you on." [Tr. 966]. The prosecutor then proceeded to itemize the aggravating and mitigating circumstances specifically enumerated by statute to be considered. [Tr. 966-71]. Likewise, petitioner's defense counsel at trial confined his sentencing argument to the statutorily enumerated aggravating and mitigating circumstances. [Tr. 980-84]. The trial court's findings of fact in support of the death penalty additionally were limited to the aggravating and mitigating

circumstances enumerated in the applicable Florida statute at the time. 2 App. 456a-462a.

Following this Court's decision in Hitchcock, supra, petitioner brought an original proceeding in the Supreme Court of Florida for habeas corpus relief. In that proceeding, the State conceded, and the Supreme Court of Florida found, a Hitchcock violation, but held the violation harmless because, "[b]ased on the record," the non-statutory evidence actually presented at the 1974 sentencing proceeding was insufficient to change the sentencing decision had the proceeding been conducted in conformance with Hitchcock standards. Alvord v. Dugger, 541 So.2d 598, 599-600 (Fla. 1989) (emphasis added).

On June 30, 1989, the petitioner filed his Second Motion for Post-Conviction Relief in the trial court, noting that the grounds upon which the Eleventh Circuit denied relief in 1984, 2 App. 301a-305a, on his claim relating to restriction of mitigating circumstances had subsequently been specifically rejected in Hitchcock. See 2 App. 370a-371a. Furthermore, the petitioner raised the issue of mitigating circumstances never before developed on the record of the case, which circumstances could have been, but were not, presented to the jury in 1974 due to Florida's

statutory and judicial restrictions. These restrictions barred the introduction of evidence outside the statutory scheme to be introduced in mitigation of a sentence of death. See 2 App. 368a-414a.

At trial in 1974, the only arguably mitigating evidence presented was developed through one witness called by the State, the only witness presented at the sentencing phase, who testified in summary fashion on cross-examination as to certain mitigating circumstances. See Alvord v. State, 694 So.2d 704, 706 n.1 (Fla. 1997); 1 App. 8a-10a. Alvord v. Wainwright, 564 F.Supp. 459, 464, 489 (M.D. Fla. 1983) ("Petitioner's evidence of non-statutory mitigating circumstances was notably sparse in this case."); 1 App. 143a-145a, 211a. The State's expert who presented this testimony furthermore was a witness whose mental health testimony relating to petitioner included opinions contrary to those reached by a team of psychiatrists later appointed by the Governor of Florida. This team concluded petitioner was incompetent to be

executed.[1] Alvord v. State, 694 So.2d at 707 (Anstead, J., dissenting).

The non-record mitigating evidence proffered by the petitioner in the instant proceedings below, but not permitted development at an evidentiary hearing, may be summarized as follows.[2]

The petitioner has suffered from an extreme psychiatric disorder for the entirety of his life, requiring his institutionalization in 1958, when he was 13 years old. He remained in such institutions in the State of Michigan for most of his life until early 1973, when he escaped by walking away from a low security institution and came to Florida. At the time, he was under an adjudication of insanity and incompetency in the State of Michigan, which

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[1] Petitioner was found incompetent to be executed in November 1984, under §922.07, Fla. Stat. (1983), by a team of psychiatrists appointed by the Governor of Florida. See Alvord v. State, 694 So.2d 704, 705 (Fla. 1997); 1 App. 2a-3a. Such a finding is exceedingly rare. See Barbara Ward, Competency for Execution: Problems in Law and Psychiatry, 14 Fla. St. U.L.Rev. 37, 45 and n. 59 (1986).

[2] The compelling and dramatic nature of the evidence at issue is most clearly understood by review of the Affidavit of Helen B. (Lee) Norton, relating her 1989 interview of petitioner's former wife, Brenda Brock, f/k/a Brenda Alvord. 2 App. 403a-414a.

adjudication was in effect at the time of the offenses for which he now faces sentences of death. 2 App. 392a-414a.

At the time of trial, this evidence could not be considered by the sentencing court or advisory jury as a matter of Florida law, and so was not presented to the jury. 2 App. 377a-378a; see also, e.g., Alvord v. State, 322 So.2d 533, 539 (Fla. 1975); Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) (only evidence of statutory mitigating factors admissible in capital sentencing proceeding). Additional evidence of Mr. Alvord's capacity for rehabilitation, drug and alcohol abuse and intoxication both throughout his life and on the day of the offenses of conviction, and his grotesque childhood deprivations was not presented or considered in his sentencing proceedings because of the state law limitations on mitigating circumstances in existence at the time of his trial in 1974. 2 App. 377a-378a.

Evidence available at the time of trial, but not presented, included testimony of Brenda Brock, who previously was married to the petitioner. Trial counsel failed to ask Ms. Brock for relevant mitigating information. 2 App. 413a-414a. Petitioner's parents were extremely cold toward one another and toward petitioner. 2 App. 405a. Petitioner's father rejected with profanity petitioner's

expressions of love, and his mother provided only worn-out clothes for the petitioner to wear to school, and at times dressed him in girl's clothes, resulting in other children making fun of him, although his parents had sufficient resources to buy appropriate clothing for him. 2 App. 394a, 405a-407a. He also suffered serious abuse in group and foster homes. 2 App. 397a-398a.

Petitioner's mother was seriously mentally ill for most of her life, requiring hospitalization and physical restraints. She was treated with Thorazine. 2 App. 408a-410a.

Petitioner's mental illness appears hereditary. In addition to petitioner and his mother, petitioner's namesake son has been diagnosed as psychotic and recommended to be institutionalized, but Ms. Brock fears placing him in a publicly supported institution because of her recollection of how badly the petitioner was treated in such institutions. 2 App. 411a-412a. Ms. Brock has observed petitioner's son progressively worsen in the same manner that she observed petitioner and petitioner's mother suffer ever worsening mental health. 2 App. 412a-413a. Ms. Brock has observed that her other three children, by her second marriage, do not suffer any such mental health difficulties. 2 App. 413a.

Petitioner sought out and attended church despite his parents' uninvolvement with any religious matters. 2 App. 396a-397a. Petitioner also spent a significant portion of his youth in foster and group homes, where he suffered repeated abuse, as well as abuse in one of the mental facilities in which he was institutionalized, one of which afforded no ventilation and frequently suffered summer temperatures in excess of 100 degrees. 2 App. 397a. In addition to having been rejected by his parents, 2 App. 394a-395a, petitioner was also rejected by his maternal grandmother on the basis of a single trivial incident. 2 App. 397a-398a. Despite this rejection, petitioner remained loyal and devoted to his now deceased mother throughout his life, sending her postcards and paintings. 2 App. 398a.

In addition to these grave difficulties, petitioner, at the time of the offenses of conviction, was under the extreme influence of drugs and alcohol to the extent of frequently being irrational and disoriented. 2 App. 398a. While awaiting trial, the petitioner was, for months, kept nude in a solitary confinement cell without even bedsheets or other linens, but despite these extreme conditions of confinement, he never presented any behavior problems while incarcerated pretrial. 2 App. 398a-399a.

Additionally, the sentencing court and jury were not presented evidence of the petitioner's artistic talent, including its showing of a sensitive aspect of his personality; the extreme degree of his continuing mental health difficulties; his loss of all family; and his good behavior while incarcerated. 2 App. 382a-386a, 392a-414a.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. Introduction.

The petition for writ of certiorari in this case should be granted because of the important and recurring nature of the questions presented. The judgment below also contravenes clear precedent of this Court by failing to have afforded the petitioner even an opportunity to fully present the substantial evidence mitigating against a death sentence that both exists and was proffered below. The constitutionally important questions presented have not previously been resolved by the Court.

Absent an evidentiary hearing, the court below could not have engaged in any appellate weighing of the proffered mitigating evidence because the petitioner was denied the opportunity to fully present such evidence at an

evidentiary hearing. The court below denied an evidentiary hearing while purporting to engage in a qualitative comparison between the trial record and the proffered evidence, which is incapable of qualitative analysis without full and fair presentation at either an evidentiary hearing or a new sentencing proceeding.

Additionally, the decision below of the Supreme Court of Florida was unconstitutionally arbitrary by denying an evidentiary hearing to this petitioner, while having granted such relief to others presenting similar or less substantial non-record mitigating evidence than that proffered by the petitioner. See Parker v. Dugger, 498 U.S. 308, 321 (1991). The proffered mitigating evidence not presented at trial, because of the common misunderstanding of relevant constitutional requirements by Florida courts and attorneys in 1974, clearly rises to the level of showing a substantial and injurious effect on the outcome of the petitioner's sentencing proceeding. See California v. Roy, ___ U.S. ___, ___, 117 S.Ct. 337, ___, 136 L.Ed.2d 266, 270 (1996) (per curiam) (citations omitted).

The clear constitutional error "precluded the development of true facts," Smith v. Murray, 477 U.S. 527, 538 (1986), resulting in a fundamental miscarriage of justice

in imposition of the death penalty in this case. Murray v. Carrier, 477 U.S. 478, 495-96 (1986). This is especially true where the sentencing court and advisory jury considered unconstitutional aggravating factors. 2 App. 419a-452a; see also, infra, at 20 n.3.

B. Preclusion of Mitigating Evidence from Trial Record.

This case presents a Florida petitioner who suffered error, conceded by the State and recognized by the Supreme Court of Florida, see Alvord v. Dugger, 540 So.2d 598, 599-600 (Fla. 1989), under Hitchcock v. Dugger, 481 U.S. 393 (1987). The undisputed error at issue precluded inclusion in the trial record of substantial evidence mitigating against a sentence of death. The petitioner has indisputably suffered throughout his life from severe and hereditary mental health disorders, resulting in his having been adjudicated insane and incompetent in Michigan prior to the crimes of conviction, as well as a post trial finding in Florida that the petitioner was incompetent to be executed in 1984. The petitioner further proffered below dramatic evidence, not presented at trial, of childhood neglect and

abuse, as well as familial and social deprivation and rejection.

The mitigating evidence presented at trial, adduced solely through cross-examination of a psychiatrist testifying against the petitioner, was scant, Alvord v. Wainwright, 564 F.Supp. 459, 464, 489 (M.D. Fla. 1983), belying the conclusion of the court below that the mitigating evidence proffered by the petitioner in the post-conviction proceeding below was "very similar" to the evidence presented at trial and previously considered in other proceedings. Under the unconstitutional strictures of Florida law in 1974, this additional mitigating evidence was not presented at sentencing, and the petitioner has been denied the opportunity to present such non-record evidence at an evidentiary hearing in order to demonstrate the manifest injustice of his death sentence.

The Court has long recognized the constitutional necessity of consideration by the capital sentencer of the propensities and character of a capital defendant. See Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937). Failure to consider the "intrinsic worth" of capital defendants in this calculus is fatal to a capital sentence or sentencing scheme. Furman v. Georgia, 408 U.S. 238, 270

(1972) (opinion of Brennan, J.). Absent any fair opportunity to present such evidence, the judgment of the Florida Supreme Court cannot withstand scrutiny under the constitutional principles enunciated by this Court.

Although the court below purportedly took "the asserted evidence in mitigation as true" in reaching its judgment, Alvord, 694 So.2d at 706, it characterized the petitioner's proffered evidence as:

> That he had escaped from a mental hospital at the time of the crimes, was under an adjudication of insanity and incompetency at the time of the crimes, was schizophrenic, had a history of drug and alcohol abuse, suffered from severe emotional problems as a result of a deprived childhood, has continued incompetency due to his mental problems, has a capacity for rehabilitation, and has artistic talent.

Id. However, the Florida Supreme Court misleadingly concluded that "much" of the proffered mitigating evidence is "similar" to that previously considered by the court below or was not presented because of the petitioner's refusal prior to trial to be examined by court-appointed psychiatrists in the absence of counsel. Id.; see also, Alvord v. Wainwright, 469 U.S. 956, 956-62 and n.1 (1984) (Marshall, J., dissenting from denial of certiorari) (Alvord's

refusal to be examined was based solely on his insistence that counsel be present, and trial counsel never appeared for scheduled examinations). The petitioner's non-record mitigating evidence proffered below, however, was substantially more expansive and dramatic than the evidence presented at trial, particularly the evidence that could have been presented at an evidentiary hearing or resentencing through the graphic testimony of the petitioner's former wife. 2 App. 403a-414a.

Available mitigating evidence includes evidence, not presented at trial, of the entire breadth of the petitioner's mental health history and that his mental health problems are genetic in origin, having mightily plagued his mother and son, as well as himself; his rejection by his mother, who also treated him in bizarre and irrational ways, such as dressing him in female clothing; his childhood rejection and hostility by his parents and grandparents; his efforts as a youth, despite his many other problems, to develop a religious life; his placement in foster and group homes as a child, where he was abused sexually and otherwise; his intoxication at the time of the crimes of conviction, and drug and alcohol problems so severe at that time that he was frequently irrational and disoriented; his good behavior

despite outrageous circumstances of his confinement while incarcerated prior to trial in a county jail; the fact that, through his conduct (and deficient performance by trial counsel) he was found to have waived a defense of insanity despite a substantial likelihood of acquittal had the defense been advanced; evidence that his personality includes a sensitive side. Further mitigating evidence has developed subsequent to trial, including the finding in 1984 that he was incompetent to be executed, the loss to death of the remainder of his family, and his good behavior while incarcerated following trial. 2 App. 392a-414a.

Under these circumstances, the petitioner was denied a full and fair hearing because the factual determination below is not fairly supported by the record as a whole, including the evidence proffered by the petitioner; no adequate fact-finding procedure was employed below where the petitioner was denied an evidentiary hearing at which to fully present the dramatic mitigating evidence proffered in cold pleadings; and the facts material to the issues presented were not permitted by the court below to be adequately developed because no hearing was afforded petitioner. Cf., Townsend v. Sain, 372 U.S. 293, 313 (1963) (enunciating alternative standards requiring evidentiary

hearing for federal habeas applicant). Given the absence of an opportunity for petitioner to fully present his non-record mitigating evidence at either an evidentiary hearing or a new sentencing proceeding, the Florida Supreme Court simply could not have conducted any independent and qualitative re-weighing of the non-record evidence proffered by petitioner, who was denied any opportunity to fully present both the substance and drama of such evidence.

As a result, the court below deprived the petitioner of an individualized qualitative determination, of his character and background relevant to the sentencing determination, and neither constitutionally re-weighed the evidence relevant to sentencing nor conducted any meaningful harmless error analysis.[3] Petitioner was afforded the opportunity only to proffer his substantial, non-record mitigating evidence, but was denied any hearing at which to fully present both the substance and dramatic impact of such evidence. In these circumstances, and

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[3] The gravity of the impact on the sentencing court and advisory jury of the preclusion of the mitigative evidence is magnified by unconstitutional aggravating factors having been presented at sentencing in violation of Espinosa v. Florida, 505 U.S. 1079 (1992), see 2 App. 419a-452a, although no separate independent Espinosa claim is before the Court.

particularly in light of its contrary decisions in the similar cases of Hall v. State, 541 So.2d 1125 (Fla. 1989), and Meeks v. Dugger, 576 So.2d 713 (Fla. 1991), the Florida Supreme Court's review in this case constitutes an arbitrary and irrational imposition of the death penalty. See infra at 23-28. The petitioner was deprived of the opportunity to fully present his mitigating evidence and also was deprived of any meaningful appellate review. See Parker v. Dugger, 498 U.S. 308, 321 (1991).

At the time of the petitioner's trial in 1974, the Florida statutory scheme, enforced by binding holdings of the Florida Supreme Court, precluded the advisory jury and sentencing court from being presented with substantial and relevant mitigating evidence. See Hitchcock v. Dugger, 481 U.S. 393, 396-97 (1987); State v. Dixon, 283 So.2d 1, 9-10 (Fla. 1973); Alvord v. State, 322 So.2d 533, 539 (Fla. 1975); Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976). This is constitutional error of the first magnitude, resulting in a fundamental miscarriage of justice. See Hitchcock, 481 U.S. at 398-99; Skipper v. South Carolina, 476 U.S. 1, 4 (1986); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); Lockett v. Ohio, 438 U.S. 586, 608 (1978).

The Court's review is warranted because the Court has not directly resolved the important and recurring questions presented in this petition. The judgment of the Florida Supreme Court, however, conflicts with principles clearly enunciated in decisions of this Court relating to presentation of evidence mitigating against imposition of the penalty of death. Accordingly, review by this Court is appropriate.

C. Arbitrary and Capricious Imposition of Death Penalty.

The Court additionally should grant review because the Florida Supreme Court, in reviewing Hitchcock error involving mitigating circumstances not within the trial record, made its determinations arbitrarily and capriciously, in violation of the Due Process Clause of the Fourteenth Amendment, in light of its contrary holdings in the most similar cases it has decided. For example, in Hall v. State, 541 So.2d 1125 (Fla. 1989), the court vacated the death sentence and ordered a new penalty phase proceeding on Hall's second state post-conviction motion where, although six categories of non-statutory mitigating evidence actually had been presented at the sentencing hearing, the Hitchcock

error in Hall prevented his trial counsel from investigating and discovering evidence showing that the defendant suffered extreme mental and emotional problems, suffered from organic brain dysfunction and was illiterate. See, id.; Alvord v. State, 694 So.2d 704, 707 (Fla. 1997). In Hall, the court specifically held that its denial of relief to Hall on a previous Hitchcock claim, involving whether evidence actually presented at trial was precluded from being considered by the sentencing court and advisory jury, did not constitute a procedural bar to Hall's subsequent post-conviction claim relating to mitigating evidence not previously made part of the record in the case. Hall, 541 So.2d at 1126.

Although the non-record mitigating evidence in Hall was "arguably less compelling" than that presented below by the petitioner, Alvord, 694 So.2d at 707 (Anstead, J., dissenting), the Florida Supreme Court denied relief to the petitioner while having granted relief in Hall. At worst for this petitioner, his non-record Hitchcock evidence is as strong as that in Hall; on the other hand, any legitimate, reasonably consistent analysis demonstrates that the petitioner's case is significantly and substantially stronger than that presented in Hall.

The court below not only failed to follow the constitutional requirements enunciated by this Court in considering the issues in this specific case, but also demonstrated in this case, as contrasted with its decisions in Hall and other cases, an arbitrary or irrational imposition or affirmance of a sentence of death. As stated in dissent below, "There is no credible basis for distinguishing this case from our holding in Hall v. State, 541 So.2d 1125 (Fla. 1989)...." Alvord v. State, 694 So.2d 704, 707 (Anstead, J., dissenting). "Under circumstances arguably less compelling, we afforded Hall the benefit of an evidentiary hearing before a trial court. There is no reasonable basis for treating Alvord differently." Id. at 707-08 (Anstead, J., dissenting).

Additionally, the Florida Supreme Court's decision below flies in the face of its decision in Meeks v. Dugger, 576 So.2d 713 (Fla. 1991). In Meeks, the court below concluded that Hitchcock error might be considered harmless only if evidence developed on the record were considered. The court concluded that counsel's failure to develop non-statutory mitigating evidence because of state statutory and judicial restrictions on such evidence at the time of trial, now clearly established by this Court to be

unconstitutional, negated any conclusion that the Hitchcock error was harmless. The court below ordered that Meeks be granted an evidentiary hearing on his non-record mitigating evidence claim. 576 So.2d at 716. The proffered evidence in Meeks involved mental health problems and treatment, a history of drug and alcohol abuse and severe problems resulting from a deprived childhood. Id.

In the face of Hall and Meeks, the court in the petitioner's case below clearly has failed to administer the death penalty "in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." Parker v. Dugger, 498 U.S. 308, 321 (1991), quoting, Spaziano v. Florida, 468 U.S. 447, 460 (1984) (internal quotations omitted). The Supreme Court of Florida, in reviewing the petitioner's non-record Hitchcock claim, has acted arbitrarily or irrationally in the face of its dispositions in the most similar cases it has considered. See Spaziano, 468 U.S. at 466-67; Alvord v. State, 694 So.2d 704, 707-08 (Fla. 1997) (Anstead, J., dissenting) ("no credible basis for distinguishing" Alvord from Hall, and "no reasonable basis for treating Alvord

differently" than Hall). On this basis, the Court's review is appropriate.

D. The Issues Presented Are Recurring and Constitutionally Important.

Despite the vintage of Hitchcock, Skipper, Eddings, Lockett and Ashe, the important issues presented in this petition are recurring, in Florida and elsewhere. The issues presented also involve violations of the fundamentally important constitutional requirement "that capital punishment be imposed fairly, and with reasonable consistency, or not at all," and "that a consistency produced by ignoring individual differences is a false consistency." Eddings, 455 U.S. at 112. At the time of petitioner's trial in 1974, he was sentenced to death under an unconstitutional statutory regime enforced during that period of time by the Florida Supreme Court prior to this Court's clear rebukes of the mid-1970s Florida capital sentencing process.

Under the strictures countenanced by Florida at the time of petitioner's trial, a wealth of non-statutory mitigating evidence was not sought, discovered or presented at trial because of the futility of attempting to do so under

the unconstitutional Florida capital sentencing scheme at the time. This constitutional error, given the substantial weight of the evidence proffered below, had a substantial and injurious effect on the outcome of the petitioner's sentencing proceeding. Accordingly, this Court should grant review of the important and recurring constitutional questions presented and correct the substantial errors made and countenanced in this case by the Florida Supreme Court.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Wm. J. Sheppard, Esquire
COUNSEL OF RECORD
D. Gray Thomas, Esquire
Elizabeth L. White, Esquire
Sheppard and White, P.A.
215 Washington Street
Jacksonville, Fl. 32202
(904) 356-9661
COUNSEL FOR PETITIONER

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